No. 15,749

United States Court of Appeals

For the Ninth Circuit

MARIE GERMAINE ROSE ANNA BISAILLON,
Appellant,

vs.

WILLIAM A. HOGAN, District Director, Immigration and Naturalization Service, Honolulu,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF JURISDICTION.

The United States District Court for the District of Hawaii had jurisdiction of the action for declaratory judgment filed therein by Appellant under the provisions of the Act of June 11, 1946, c. 324, Sec. 19, 60 Stat. 243, 5 U.S.C.A. 1009. This Court has jurisdiction of the appeal taken by Appellant from the final judgment dismissing that action under the provisions of Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE.

Appellant was born in Montreal, Canada, and is a native and citizen of that country (Ex. 8, p. 9;

R. 23). She was first admitted to the United States for permanent residence at St. Albans, Vermont, on December 8, 1947; she departed from the United States sometime after June 23, 1950, and re-entered the United States from Brazil at San Juan, Porto Rico, on August 30, 1950 (Ex. 8, pp. 10-11). She is the owner and manager of a four-unit apartment house in Waikiki, Honolulu, T.H. (Ex. 8, p. 9).

On October 20, 1955, Appellant was convicted of violations of Sections 911 and 1542, Title 18, U.S.C., in the United States District Court for the District of Hawaii in Criminal Case No. 10,982; on December 29, 1955, she was convicted of violations of Sections 911 and 1542, Title 18, U.S.C., in the same Court in Criminal Case No. 10,993 (R. 13; Ex. 8, pp. 11-13; Ex. A, Sub-Ex. 5 and 6*). In No. 10,982, Count I of the Information filed against Appellant, in which she is charged with a violation of Section 1542, alleges in substance that on or about August 16, 1954, she made a false statement in the application of one Florence Paquet for a United States passport in that she stated she was not related to Florence Paquet and that she knew Florence Paquet to be a citizen of the United States (Ex. A, Sub-Ex. 5). In No. 10,993, in Count I of the Indictment returned against Appellant, she is charged with another violation of Section 1542, to-wit: That on or about January 16, 1953, she made a false statement in an application

*"Sub-ex" whenever used in this brief designates the exhibit attached to the original transcript of the deportation hearing contained in Exhibit A.

for a passport that she was born in Laurin, Montana, on October 10, 1919 (Ex. A, Sub-Ex. 6).

Following conviction in No. 10,982, Appellant was sentenced to 18 months in prison (Ex. A, Sub-Ex. 5). Following conviction in No. 10,993, she was sentenced to pay a fine of $1,000.00 on Count I of the Indictment (Ex. A, Sub-Ex. 6).

While serving the prison term of 18 months imposed as a result of her first conviction she was served at the prison with a warrant of arrest dated January 4, 1956, preliminary to deportation proceedings being commenced against her (R. 19, Ex. 1 a). In the warrant she is charged with being in the United States in violation of its immigration laws in that she had been convicted of a crime involving moral turpitude committed within five (5) years after entry and sentenced to confinment for a year or more (18 U.S.C. 1542), and in that she had been convicted after entry of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (18 U.S.C. 1542 and 911), thereby making her deportable under Section 241 (a) (4) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251 (a) (4).

After receiving this warrant, Appellant promptly retained the services of Elmer E. Poston, a retired district director of the Immigration and Naturalization Service for the District of Hawaii (R. 27, Exhibit 2). Because of his previous employment the service questioned Mr. Poston's right to represent

Appellant in the deportation proceeding and this matter was determined adversely to Appellant by the Board of Immigration Appeals (Ex. 3). Immediately after receipt of this advice, Mr. Poston, by letter dated March 17, 1956, and received by Mr. Hogan, the district director of the Immigration and Naturalization Service on March 19th at 2:21 p.m., advised that he had applied to the board for reconsideration of its decision and requested a continuance of the hearing (R. 77, 79). On March 20, 1956, Mr. Hogan addressed a letter to Appellant at Oahu Prison, where she was incarcerated, advising that her deportation hearing would be held April 9, 1957, and that Mr. Poston was disqualified from representing her (Ex. 3). Appellant was also apprised by Mr. Poston that he was seeking reconsideration of this ruling, and right up to the time it commenced she expected him to represent her at the hearing (Ex. 8, p. 4, R. 35). On March 21, 1956, Mr. Poston addressed a letter to Mr. Finucane, the chairman of the Board of Immigration Appeals, advising that the deportation hearing had been set for April 9, 1956, and requesting expeditious action on his motion for reconsideration; a copy of this letter was sent to the Honolulu office of the Service (R. 79-80). No action was taken on the motion for reconsideration of Mr. Poston's disqualification until April 25, 1956 (R. 80). The deportation hearing was held April 9 and 13, 1956, before Mr. Arnold, special inquiry officer, at the prison, and Mr. Poston was not there nor was Appellant represented by any counsel (Ex. 8).

Exhibit 8, consisting of 20 pages, is a transcript of the proceedings had on April 9 and 13, 1956. It is incomplete as there are 12 occasions when there were "discussion(s) off the record" (Ex. 8, pp. 6, 7, 9, 12, 13, 14, 15, 16, 17, 19). Evidence of the criminal charges presented and of her convictions thereon was received (Ex. 8 pp. 11-13; Ex. A, Sub-Ex. 5 and 6). The major portion of Exhibit 8 is devoted to the matter of her not having counsel and clearly reflects how she was pressured into consenting to proceed with the hearing without counsel. This will be discussed more fully in the argument below. A written "stipulation" offered at the hearing by Appellant was rejected without examination because it had been prepared by Mr. Poston (Ex. 8, pp. 3, 4, 5).

Sometime after the deportation hearing commenced on April 9, 1956, the examining officer lodged two new charges against Appellant, namely, that she was deportable because of her conviction of a violation of Section 1542, Title 8, U.S.C., and sentence of 18 months on that conviction and because of her two convictions of violations of Section 1542, Title 8, U.S.C. (Ex. 8, p. 14). After this new charge was lodged the hearing was continued to April 13, 1956 (Ex. 8, p. 15). On April 13, 1956, the only additional evidence taken was to have Appellant repeat her name and to examine her as to whether she wanted counsel and what attempts she had made to obtain counsel between April 9 and 13, 1956 (Ex. 8, pp. 16-19).

On May 4, 1956, Mr. Hogan addressed a letter to Appellant at the prison enclosing the decision of the special inquiry officer finding her deportable on the charges lodged at the hearing (Ex. 4a and Ex. 4b). In this connection the special inquiry officer ruled that Appellant's violations of Section 1542, Title 18, U.S.C., involved moral turpitude, but that her violation of Section 911, Title 18, U.S.C., did not. From this decision Appellant, through her present counsel, took an appeal to the Board of Immigration Appeals and her appeal was dismissed (R. 42). By letter dated November 21, 1956, and addressed to Appellant at the prison, Mr. Hogan advised her that her appeal had been denied and that she would be taken into custody December 3, 1956, and deported shortly thereafter (Ex. 5).

On November 27, 1956, Appellant filed her complaint in the District Court praying for a judgment declaring her not deportable (R. 3-6). An answer was filed December 4, 1956 (R. 10-12). Appellant completed her term and was released from prison in January, 1957 (R. 81). After hearing, the District Court entered findings of fact and conclusions of law in which it held in part that the grounds of the decision of the special inquiry officer that Appellant was deportable were correct and that she had been afforded a fair hearing and not been denied her right to counsel at the deportation hearing or that, if she was, such denial was not prejudicial (R. 12-16). Judgment was entered dismissing the complaint on June 11, 1957 (R. 16-17). From this judg-

ment this appeal has been duly perfected (R. 17, 18, 120-126).

STATUTES AND REGULATIONS INVOLVED.

Act of June 27, 1952, c. 477, Title II, ch. 5, §241 (a)(4), 66 Stat. 204, 8 U.S.C. 1251(a)(4):

"1251. Deportable aliens—General Classes.

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

Act of June 25, 1948, c. 645, 62 Stat. 771, 18 U.S.C. 1542:

"1542. False statement in application and use of passport.

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Section 242.15, Title 8, C.F.R.:

"242.15. Contents of record.

The hearing before the special inquiry officer, including the respondent's pleading, the testimony, the exhibits, the special inquiry officer's decision, and all written orders, motions, appeals, and other papers filed in the proceeding shall constitute the record in case. The hearing shall be recorded verbatim except for statements made off record with the permission of the special inquiry officer."

Act. of June 27, 1952, c. 477, Title II, ch. 5, §242, 66 Stat. 208, 8 U.S.C. 1252(b) provides in part as follows:

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present. * * * Proceedings before a special inquiry officer acting under the provisions of this

section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *"

QUESTIONS PRESENTED.

1. Does any violation of Section 1542, Title 18, U.S.C., necessarily involve moral turpitude?

If the answer to this question is "No," the Appellant is not deportable.

2. Do Appellant's violations of Section 1542, Title 18, U.S.C., involve moral turpitude?

If the answer to this question is "No," the Appellant is not deportable.

3. Was Appellant given a fair hearing on the question of whether she is deportable?

4. Did the special inquiry officer and the District Court err by receiving in evidence the criminal charges preferred against Appellant for the purpose of determining whether her violation of Section 1542, Title 18, U.S.C., involved moral turpitude or not?

SPECIFICATIONS OF ERRORS.

1. The District Court erred in holding that any violation of Section 1542, Title 8, U.S.C., involved moral turpitude.

2. The District Court erred in holding that Appellant's violations of Section 1542, Title 8, U.S.C., involved moral turpitude.

3. The District Court erred in holding that Appellant's deportation hearing was a fair hearing in that

(a) she was denied her right to counsel; and

(b) the record of the hearing on which the District Court's finding is based is incomplete.

4. The Court erred in receiving into evidence (Exhibit A) the information and indictment charging Appellant with violation of Section 1542, Title 18, U.S.C., for the purpose of determining whether her violations of that section involved moral turpitude.

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN HOLDING THAT ANY VIOLATION OF SECTION 1542, TITLE 18, U.S.C., INVOLVES MORAL TURPITUDE.

Section 1542 provides as follows:

> "Whoever willfully and wrongly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passport or the rules prescribed pursuant to such laws; or
>
> Whoever willfully and wrongly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—
>
> Shall be fined not more than $2,000.00 or imprisoned not more than five years, or both."

The District Court approved the findings of the special inquiry officer that Appellant is deportable because she had been convicted of a crime (Section 1542, Title 18, U.S.C.) involving moral turpitude committed within five years after entry, and confined therefor more than one year, and because after entry she had been convicted of two crimes (both of them Section 1542, Title 18, U.S.C.) involving moral turpitude and not arising out of a single scheme of criminal misconduct.

The question of whether a crime involves moral turpitude is to be determined in the light of how

such crime is regarded by the community or the average man, not by how an ideal citizen would feel about such crime. *United States ex rel Iorio v. Day,* 2d Cir., 1929, 34 F.2d 920.

To involve moral turpitude, the act or acts which constitute the crime must evidence baseness, vileness or depravity of moral character. *United States ex rel Mylius v. Uhl,* S.D.N.Y., 1913, 203 F. 152, 154 aff'd 2d Cir., 1914, 210 F. 860; *United States ex rel Meyer v. Day,* 2d Cir., 1931, 54 F.2d 336; *United States v. Carrollo,* W.D. Mo., 1939, 30 F. Supp. 3, 7; *United States ex rel Manzella v. Zimmerman,* E. D. Pa. 1947, 71 F. Supp. 534; *United States ex rel Teper v. Miller,* S.D.N.Y., 87 F. Supp. 285; *Pino v. Nicolls,* D.C. Mass., 1954, 119 F. Supp. 122, aff'd 215 F.2d 237, rev'd on other grounds 349 U.S. 901; *Vidal Y. Planas v. Landon,* S.D. Calif., 1952, 104 F. Supp. 384; *In the Matter of B,* 6 I. & N. Dec. 98, 106.

As was stated in *In the Matter of B* at page 107:

> "One of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind."

In the *Carrollo* case, in which the question of whether the attempted evasion of taxes involved moral turpitude was at issue, the Court stated:

> "We are not prepared to rule that an attempt to evade the payment of a tax due the nation or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, is an act evidencing baseness, vileness or depravity of

> moral character. The number of men who have at some time sought to evade the payment of tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse the words."

A crime does not involve moral turpitude if before it was made punishable as a crime it was not generally regarded as morally wrong, or as offensive to the moral sense of the community. *Coykendall v. Skrmetta,* 5th Cir., 1927, 22 F.2d 120; *In the Matter of R,* 6 I. & N. Dec. 440, 452.

The test of whether the crimes of which Appellant was convicted involve moral turpitude does not lie in the acts which she did, but rather, in whether any act or combination of acts, which would constitute an offense under the statute defining the crime, inherently or necessarily involve moral turpitude.

In the Matter of R, 6 I. & N. 444, at page 448, the Board of Immigration Appeals held that:

> "If, on the other hand, we find that the law punishes acts which do not involve moral turpitude, then we *must* rule that *no* conviction under that law involves moral turpitude, although in the particular instance conduct was immoral. (*United States ex rel Robinson v. Day, supra*)."

To the same effect see: *United States ex rel Mylius v. Uhl, supra; United States ex rel Manzella v. Zimmerman, supra* at p. 538; *United States ex rel Guarino v. Uhl,* 2d Cir., 1939, 107 F.2d 399; *In the Matter of E,* 2 I. & N. 134, 145; *United States v. Carrollo, supra.*

In cases not involving violence the Courts sometimes have determined whether moral turpitude is involved by whether fraud is or is not an essential element of the offense. *United States ex rel de George v. Jordan,* 341 U.S. 223 (1951); *United States ex rel Berlandi v. Reimer et al.,* S.D.N.Y. 1939, 30 F. Supp. 767, aff'd 113 F.2d 429; *Ponzi v. Ward,* D. C. Mass., 1934, 7 F. Supp. 736.

It must be apparent that an applicant for a United States passport could commit a violation of Section 1542 by giving false information as to the date of his birth, the place where he was born, his occupation, his address, the name of his wife and/or many other things called for in the application. If done knowingly, he should be punished, but as was stated in the *Carrollo* case, *supra,* "To say that he is base, or vile, or depraved is to misuse words." Under the principles set out above, the Court cannot look at the evidence to see whether such an applicant had a criminal intent at the time he made the false statement; he may have done it because he was embarrassed about his age or the town in which he was born or lived, or because his wife was insane, or simply because he considered himself a "rugged individualist" and that the information requested was none of the Government's business. Also, even if he were to tell the truth he might still be entitled to a passport.

In fact, it is Appellant's contention that even if the violation of Section 1542 consists of making a false statement without which the passport would

not have been issued, such as a false claim to American citizenship, such a violation is not fraudulent.

Bridges v. United States, 346 U.S. 209 (1953), involves the question of whether the period of limitations had tolled in connection with making a false material statement under oath in a naturalization proceeding (Section 1015, Title 18, U.S.C.). The United States took the position that it came under a special extended period of limitations created by the Wartime Suspension of Limitations Act (Section 3287, Title 18, U.S.C.) relating to the commission of frauds against the Government. The Court found that fraud was not an essential ingredient of the offense and that accordingly that Section 3287 did not apply. Certainly the gain of citizenship is more valuable to the offender than the gain of a passport.

In *United States v. Shoso Nii,* D.C. Hawaii 1951, 96 F. Supp. 971, the defendant was charged with a violation of Section 220, Title 22, U.S.C., 1940 ed., from which Section 1542 is derived. Here again the Government had to rely on the Wartime Suspension of Limitations Act, but the District Court dismissed the indictment on the ground that no fraud was involved. The Government later on its own motion dismissed the appeal it had taken from that decision (342 U.S. 912).

A deportation statute is to be construed in the light most favorable to the alien. *Delgadillo v. Carmichael,* 332 U.S. 388 (1947). When this is done in the instant case, it is apparent that the minimum acts required for a violation of Section 1542, Title

18, U.S.C., do not involve moral turpitude any more than does an unlawful escape (*United States ex rel Manzella v. Zimmerman, supra*), and far less than an attempt to evade taxes does. (*United States v. Carrollo, supra*).

II.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT'S VIOLATIONS OF SECTION 1542, TITLE 18, U.S.C., INVOLVED MORAL TURPITUDE.

It was the position of both the District Court and the special inquiry officer that the charges presented against Appellant and the judgments convicting her on those charges could be examined to determine whether the offenses involved moral turpitude.

In Cr. No. 10,982 in Count I, Appellant is charged with having on or about August 16, 1954, falsely stated in the application of Florence Paquet that she was not related to Florence Paquet and that she knew Florence Paquet to be a citizen of the United States with the intention to induce the issuance of a passport to Florence Paquet. In Criminal No. 10,993 in Count I, Appellant is charged with having falsely stated on or about January 16, 1953, that she was born in Laurin, Montana, on October 10, 1919, with the intention to induce the issuance of a passport to herself. In substance the judgments of conviction reiterate the charges (Ex. A, Sub-Ex. 5 and 6).

> ". . . a crime involves moral turpitude when its nature is such that it manifests upon the part of its perpetrator personal depravity or base-

ness." *United States ex rel Mylius v. Uhl, supra.*

In the Matter of E, 2 I. & N. 134, the Board of Immigration Appeals quoting from *United States ex rel Mylius v. Uhl* states:

> "Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not *necessarily* involve moral turpitude, the alien cannot be deported because in the particular instance his crime was immoral * * *. Conversely, when it does, no evidence is competent that he was in fact blameless (*United States ex rel Robinson v. Day,* 51 F. (2d) 1022 (C.C.A. 2d 1931).
>
> "It is the moral obliquity of the crime and not of the individual. That is the test under the law. * * *"

Assuming, for purposes of argument only, that the action of the special inquiry officer and of the Court, in looking at the charges and the judgments to determine whether the offenses involved moral turpitude, their interpretation of this phrase should have been liberal and the benefit of any doubtful meaning which it may have should have been given to Appellant.

> "We resolve the doubts in favor of that construction (a liberal construction) because deportation is a drastic measure and at times is the equivalent of banishment or exile. *Delgadillo v. Carmichael,* 332 U.S. 388. It is the forfeiture for misconduct of a residence of this country.

> Such a forfeiture is a penalty. To construe this statutory provision law generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the word used." *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10.

Though evidence *aliunde* is not to be considered, the passports obtained were used simply to go to Guam rather than to claim the rights of an American citizen in a foreign land, and a passport to enter Guam is needed only because the Navy requires it.

It is respectfully submitted that the acts alleged in the charges and the facts stated in the judgments of conviction do not constitute "crimes which shock the public conscience, such as crimes of violence, or crimes revealing inherent baseness, vileness or depravity." *United States v. Jordan,* 7th Cir., 1950, 183 F.2d 768.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT'S DEPORTATION HEARING WAS A FAIR HEARING IN THAT (a) SHE WAS DENIED HER RIGHT TO COUNSEL; AND THE RECORD OF THE HEARING ON WHICH THE DISTRICT COURT'S FINDING IS BASED IS INCOMPLETE.

(a) Denial of right to counsel.

Section 1252(b), Title 8, U.S.C., provides in part that at a deportation hearing the alien shall have the privilege of being represented by counsel of his choice. Appellant had selected a competent qualified

counsel who had formerly been a district director with the Immigration Service. The Board of Immigration Appeals ruled that he was disqualified; he applied for reconsideration and on March 19, 1956, Mr. Hogan, the district director in Honolulu was advised of this. The next day Mr. Hogan ordered the matter of Appellant's deportation set down for hearing on April 9, 1956. His excuse for this was that he wanted the matter disposed of before Appellant became eligible for parole in May (R. 81). Appellant's counsel requested that his application for reconsideration be expedited, but no decision was made until April 25, 1956, twelve days after the deportation hearing had been concluded (R. 79-80). Appellant was not released until January of 1957. Even if Appellant had obtained an unconditional parole in May the service must have known that her status could not be finally settled by them as she always had the right to appeal to the Board of Immigration Appeals.

A reading of the transcript of the deportation hearing clearly reflects that Appellant insisted on being represented by counsel of her choice, but that when she saw they were going ahead with the hearing anyway she gave in and consented to their proceeding (Ex. 8). The hearing commenced on a Monday, and when it became necessary to continue it because of the new charges being filed by the examining officer even her request that it be continued over the following weekend so she could consult with friends or her cousin about getting other counsel was denied (R. 105, Ex. 8, p. 15).

The District Court held that even if this constituted a denial of Appellant's right to counsel it was not prejudicial because the facts were undisputed (R. 15). There was, however, a serious question of law involved and it is submitted that Appellant was entitled to have that presented to the special inquiry officer through counsel of her choice. It is no answer to say that she was subsequently represented by counsel before the Board of Immigration Appeals and the District Court. With competent counsel the matter might never have had to go beyond the first stage. Objections could have been made to the introduction of evidence and her record on this score preserved. All relevant and material portions of the hearing would have been recorded instead of having so many instances of discussion(s) "off the record."

It is Appellant's contention that having been denied her right to counsel she was not afforded a fair hearing. *Handlovits v. Adcock,* E. D. Mich. 1948, 80 F. Supp. 425.

In *Bridges v. Wixon,* 326 U.S. 135, 153 (1955), the Court stated:

> "It was assumed in *Bilokumsky v. Tod,* 263 U.S. 149, 155, that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.' We adhere to that principle."

and at page 154:

> "That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous

> care must be exercised lest the procedures by which he is deprived of that liberty not meet the essential standards of fairness."

As was held in the *Handlovits* case, "It is not compliance with requirements of a fair hearing to say that she would be subject to deportation in any event."

(b) Incomplete record.

As stated in Section 1252(b), Title 8, U.S.C., *supra* p. 6: "Determination of deportability in any case may be made only upon a record made in a proceeding before a special inquiry officer." Section 242.15, Title 8, C.F.R., provides that "The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer." However, a record of 20 pages containing 12 discussion(s) "off the record," many of which pertained to the important question of whether Appellant was to be represented by counsel, does not constitute the type of record required under §1252(b), Title 8, U.S.C., nor does it provide the type of record capable of review in a proceeding under the Administrative Procedure Act, Section 1009, Title 5, U.S.C. *Isbrandtsen Co. v. United States,* D.C.N.Y. 1951, 96 F. Supp. 883, aff'd 342 U.S. 950.

It is to be noted that none of the testimony was placed "off the record" at the request of Appellant, that was usually done "at the suggestion of the special inquiry officer" (R. 101-102). In *United States ex rel Bauer v. Shaughnessy,* S.D.N.Y., 1949,

115 F. Supp. 780, 784, cert. den. 332 U.S. 839, the Court approved the use of off the record discussions on the ground that no objections to this procedure had been voiced by the alien, but in that case the alien was a patent attorney.

> ". . . where, a board or commission is required to base its actions on findings to be made after a hearing, a definite record must be made of all evidence produced before the Commission and all matters upon which it bases its order. The function of the court to prevent abuse of power by administrative officers can be fulfilled only when a full record is preserved of the essentials on which the officers proceed to judgment. A failure to make and preserve such a record for the purposes of administrative as well as judicial review may constitute a denial of a fair hearing." 42 Am. Jur. 390.

In *Kwock Jan Fat v. White,* 253 U. S. (1920), the Court reviewed the adequacy of a record of an exclusion hearing. The Court held at page 464:

> "It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited to prevent abuse of this extraordinary power, and this is possible only when a *full* record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed." (Emphasis supplied.)

IV.

THE DISTRICT COURT ERRED IN RECEIVING INTO EVIDENCE THE INFORMATION AND THE INDICTMENT CHARGING APPELLANT WITH VIOLATIONS OF SECTION 1542, TITLE 18, U.S.C.

As argued in assignment of error I above, it is Appellant's position that the Court and the special inquiry officer should have looked no further than the statute under which Appellant was charged and convicted.

It has recently been settled by this Court in *Tseung Chu v. Cornell,* 9th Cir., 1957, 247 F.2d 929, 936, that the record of conviction includes the indictment, plea, verdict and sentence, and this assignment is made to preserve Appellant's record on this point.

To examine the charge (Ex. A, Sub-Ex. 5 and 6) is contrary to the line of cases which hold that if any offense under the statute might not involve moral turpitude that then the alien's particular violation does not necessarily or inherently involve moral turpitude.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Honolulu, T. H.,
February 18, 1958.

HOWARD K. HODDICK,
Attorney for Appellant.